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Gender-inclusive legislative drafting in English: A matter of clarity

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Gender inclusivity is a prominent theme in gender and feminist studies. It has touched legislative studies too, but only in the periphery. Most legislative drafters and legislative academics, including this author, lack expert understanding of variations of sex and gender and the possible consequences of subscribing to any one of the many approaches to the subject. As a result, in legislative theory and practice, it is the difficulty in expressing legislation in a gender-neutral or gender-inclusive manner that seems to sustain gender specificity.

The hypothesis of this paper is that gender-inclusive, rather than gender-neutral, language contributes to clarity of the legislative text, and thus ultimately serves legislative effectiveness and legislative quality. In order to prove this hypothesis, the paper will begin by defining gender-neutral language and juxtaposing it to gender-inclusive language. It will then present the link between gender-inclusive language, clarity, and ultimately legislative effectiveness. Finally, it will identify the most effective technique for gender inclusivity by applying Thornton's drafting methodology.

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I. Gender-neutral and gender-inclusive language¹

Gender-neutral language (GNL) refers to language that includes all sexes and treats women and men equally.² Traditionally, in our society, men have been the dominant force and our language has developed in ways that reflect male dominance, sometimes to the total exclusion of women. Gender-neutral language, also called non-sexist, non-gender-specific, or inclusive language, attempts to redress the balance.³

Admittedly, the mere reference to GND seems to bring many a drafter around the Commonwealth to covert amusement.⁴ It is often ridiculed as one more feminist invasion in legislative drafting, and it is often justified by reference to the provision common in many Interpretation Acts that foresee that “he” includes “she”.

Gender-Inclusive Language (GIL) language takes the argument further. In an attempt to put to effect the principle that every citizen is equal before the eyes of the law, it aims to delete sex and gender from the expression of the subjects of legislation. Therefore, instead of ensuring that both men and women are within the scope of legislative expression, as is the case with GNL, GIL aims to eliminate the consideration of sex and gender altogether. As a result, it differs from GNL in that it avoids any classification of sex and gender. With GIL the subject does not need to be classified or to identify as any sex or gender.

A GI draft simply renders sex and gender irrelevant as a consideration. This is not an innovative approach. Legislators have achieved that goal with reference to race, for example⁵. Legislation that is race inclusive does not refer to “anyone, black, white, yellow, or any other colour”. In application of the same approach, GI legislation does not refer to “anyone, male or female or any other sex or gender”. In this respect, GIL can be open to opposition by some feminist groups, who may find that

¹ For a full analysis of GND, see H. Xanthaki, “Drafting Legislation: Art and Technology of Rules for Regulation” (Oxford, Hart Publishers, 2014), 103 ss.

² See D. Greenberg, “The Techniques of Gender-Neutral Drafting” in C. Stefanou and H. Xanthaki (eds.), “Drafting Legislation: A Modern Approach” (Aldershot, Ashgate, 2008) 63.

³ See UNESCO, “Guidelines on Gender-Neutral Language”, 1999.

⁴ See W. B. Hill Jr., “A need for the use of non-sexist language in the courts” (1992) 49 Wash. & Lee L. Rev. 275.

⁵ From the point of view of legislative expression experiences of eliminating race from legislative language can be used to guide the drafter in possible ways forward for the elimination of sex and gender from legislative language.

the elimination of considerations of sex and gender is counter-productive to the feminist cause that often aims to draw attention to existing differentiations against women. Of course, this would be incorrect. GIL may eliminate sex and gender from legislative expression but this does not affect pro-women policy choices, nor their expression in gender-specific language where appropriate. In fact, one could argue that in the environment of a GIL statute book, gender-specific language would have even more impact in drawing the users' attention to the specific position of women in gender-specific legislative texts.

The question is, what is the theoretical underpinning of GIL, and how is it supported in theoretical legislative studies?

II. Gender-inclusive language, clarity, and legislative effectiveness

In order to identify the theoretical grounding of GIL, it is worth setting it against the theoretical basis of phronetic legislative study. Within this functionalist realm, legislation is viewed as a tool for regulation, as the legislative expression of government policy⁶. Regulation, in the sense used in this analysis, is the process of putting government policies into effect⁷ to the degree and extent intended by government.⁸ One of the many⁹ regulatory schemes¹⁰ or tools¹¹

⁶ A statute is the formal expression of legislative policy: see E. A. Driedger, "The Composition of Legislation – Legislative Forms and Precedents" (Ottawa, MoJ, 1976), xv.

⁷ See L. Alexander and E. Sherwin, "The Rule of Rules: Morality, Rules, and the Dilemmas of Law" (USA, Duke University Press, 2001), 188.

⁸ See National Audit Office, Department for Business, Innovations and Skills, "Delivering regulatory reform", 10 February 2011, para. 1.

⁹ See Better Regulation Task Force (BRTF), "Routes to Better Regulation: A Guide to Alternatives to Classic Regulation", December 2005.

¹⁰ See J. C. Miller III, "The FTC and Voluntary Standards: Maximizing the Net Benefits of Self-Regulation" (1985) 4 *Cato Journal* 897.

¹¹ See OECD Report, "Alternatives to traditional regulation", para. 0.3; and also OECD, "Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance" (Paris, OECD, 2002).

avail-able to governments¹² is formally authorised legislation¹³. Legislation is the last and least tool for regulation.¹⁴

Procedurally the drafting process, analysed methodologically by Thornton in five stages¹⁵, forms part of the legislative process, which in turn forms part of the policy process.¹⁶ Given this interrelation of processes and concepts, drafters can only aim to perform well in their little, albeit crucial, part in the application of governmental policy better expressed as regulation.¹⁷ The diagram¹⁸ below visualises these goals and their hierarchy.

¹² See A. Flückiger, “Régulation, dérégulation, autorégulation : l’émérgence des actes étatiques non obligatoires” (2004) 123 *Revue de droit suisse* 159.

¹³ See Y. Blankt, “The Reenchantment of law” (2010-2011) 96 *Cornell LRe* 633, 639.

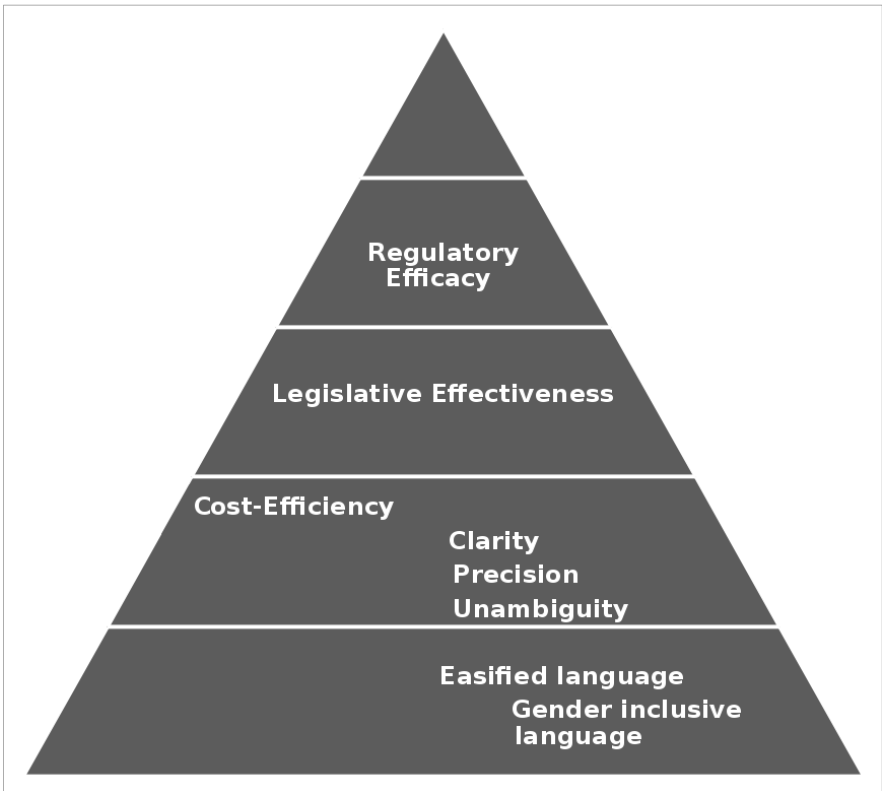
¹⁴ See S. Weatherhill, “The challenge of better regulation” in S. Weatherhill (ed.), “Better Regulation”, (Oxford and Portland, Hart, 2007) 1, 19.

¹⁵ See H. Xanthaki, “Thorntons Legislative Drafting”, 5th edition (London, Bloomsbury, 2013).

¹⁶ See C. Stefanou, “Legislative Drafting as a form of Communication” in L. Mader and M. Travares-Almeida (eds.), “Quality of Legislation Principles and Instruments” (Baden-Baden, Nomos, 2011), 308; and also see C. Stefanou, “Drafters, Drafting and the Policy Process” in C. Stefanou and H. Xanthaki (eds.), “Drafting Legislation: A Modern Approach” (Aldershot, Ashgate, 2008) 321.

¹⁷ In fact, there is an emergence of a public interest in good quality of rules: see M. De Benedetto, M. Martelli and N. Rangone, “La Qualità delle Regole” (Bologna, Il Mulino, 2011), 23.

¹⁸ See H. Xanthaki, “On transferability of legislative solutions: the functionality test” in C. Stefanou and H. Xanthaki (eds.), “Drafting Legislation: A Modern Approach” (Aldershot, Ashgate, 2008) 1. The basis of the diagramme remains the same but the entries have been updated for clarity.



At the top of the pyramid lies regulatory efficacy, which is defined as the extent to which regulators achieve their goal.¹⁹ In the non-English speaking bibliography, the term used is effectiveness but defined as and I call efficacy: the measure to which the performance data of the legislation match its objectives.²⁰ The concept is the same. In English, the use of regulatory efficacy as a term conveys better the etymologically factual nature of the concept of efficacy. Moreover, it allows the use of effectiveness as a term reflecting the capacity of the legislative text to produce efficacy. This paper therefore remains with the term efficacy.

¹⁹ See *ibid.*, 126; also see M. Mousmouti, "Operationalising Quality of Legislation through the Effectiveness Test" (2012) 6 *Legisprudence* 191, 200.

²⁰ Also see A. Flückiger, "L'évaluation législative ou comment mesurer l'efficacité des lois" (2007) *Revue européenne des sciences sociales* 83.

Indeed, taking into account the concentricity of the policy, legislative, and drafting cycles²¹, the legislative part of efficacy signifies the capacity of legislation to achieve the regulatory aims that it is set to address.²² Within the umbrella of efficacy, the drafter pursues effectiveness in legislation.²³ The term is used widely but often without a definition.²⁴ Mader defines effectiveness as the extent to which the observable attitudes and behaviours of the target population correspond to the attitudes and behaviours prescribed by the legislator.²⁵ Snyder defines effectiveness as “the fact that law matters: it has effects on political, economic and social life outside the law – that it, apart from simply the elaboration of legal doctrine”.²⁶ Teubner defines effectiveness as term encompassing implementation, enforcement, impact, and compliance.²⁷ Müller and Uhlmann define effectiveness as the degree to which the legislative measure has achieved a concrete goal without suffering from side effects.²⁸ In Jenkins’s socio-legal model, effectiveness in the legislation can be defined as the extent to which the legislation influences in the desired manner the social phenomenon that it aims to address.²⁹

²¹ See A. E. Black, “From Inspiration to Legislation: How and Idea Becomes a Bill” (New Jersey, Pearson Education LTD, 2007), 123.

²² See N. Gunningham and D. Sinclair, “Designing Smart Regulation”, <http://www.oecd.org/dataoecd/18/39/33947759.pdf>, 18; and also R. Baldwin, “Is Better Regulation Smarter Regulation?” (2005) Public Law 485, 511.

²³ See C. Timmermans, “How Can One Improve the Quality of Community Legislation?” (1997) 34 Common Market Law Review 1229, 1236-7.

²⁴ See “European Governance: Better lawmaking”, Communication from the Commission, COM(2002) 275 final, Brussels, 5.6.2002; also see High Level Group on the Operation of Internal Market, “The Internal Market After 1992: Meeting the Challenge – Report to the EEC Commission by the High Level Group on the Operation of Internal Market”, SEC (92) 2044. See Office of Parliamentary Counsel, “Working with OPC”, 6 December 2011; and OPC, “Drafting Guidance”, 16 December 2011.

²⁵ See L. Mader, “Evaluating the effect: a contribution to the quality of legislation” (2001) 22 Statute Law Review 119, 126.

²⁶ See F. Snyder, “The effectiveness of European Community Law: institutions, processes, tools and techniques” (1993) 56 Mod L Rev 19, 19; also F. Snyder, “New Directions in European Community Law” (London, Weidenfeld and Nicolson, 1990), 3.

²⁷ See G. Teubner, “Regulatory law: Chronicle of a Death Foretold” in Lenoble (ed.), “Einführung in der Rechtssoziologie (Darmstadt, Wissenschaftliche Buchgesellschaft, 1987) 54.

²⁸ See G. Müller and F. Uhlmann, “Elemente einer Rechtssetzungslehre” (Zurich, Schulthess, 2013), 51-52.

²⁹ See I. Jenkins, “Social Order and the Limits of the Law: a Theoretical Essay” (Princeton, Princeton University Press, 1981), 180; also see R. Cranston, “Reform through legislation: the dimension of legislative technique” (1978-1979) 73 NwULRev 873, 875.

Voermans defines the principle of effectiveness as a consequence of the rule of law, which imposes a duty on the legislator to consider and respect the implementation and enforcement of legislation to be enacted.³⁰ Mousmouti describes effectiveness as a measure of the causal relations between the law and its effects: and so an effective law is one that is respected or implemented, provided that the observable degree of respect can be attributed to the norm.³¹

Whichever definition one uses, effectiveness is the ultimate measure of legislative quality legislation.³² It simply reflects the extent to which the legislation manages to introduce adequate mechanisms capable of producing the desired regulatory results.³³ In its concrete, rather than abstract conceptual sense, effectiveness requires a legislative text that can (i) foresee the main projected outcomes and use them in the drafting and formulation process; (ii) state clearly its objectives and purpose; (iii) provide for necessary and appropriate means and enforcement measures; (iv) assess and evaluate real-life effectiveness in a consistent and timely manner.³⁴

Effectiveness is enhanced by clarity, precision, and unambiguity. Clarity, or clearness,³⁵ is the quality of being clear and easily perceived or understood.³⁶ Precision is exactness of expression or detail.³⁷ Unambiguity is certain or exact meaning:³⁸ semantic unambiguity requires a single meaning for each word used³⁹, whereas syntactic unambiguity requires clear sentence structure and correct placement of phrases or clauses.⁴⁰ Clarity, precision, and unambiguity in le-

³⁰ See W. Voermans, “Concern about the Quality of EU Legislation: What Kind of Problem, by What Kind of Standards?” (2009) 2 *Erasmus Law Review* 59, 230.

³¹ See M. Mousmouti (above, n. 19), 200.

³² See H. Xanthaki, “On Transferability of Legal Solutions” in C. Stefanou and H. Xanthaki (eds.), “Drafting Legislation, A Modern Approach” (Aldershot, Ashgate, 2008) 1, 6.

³³ See Office of the Leader of the House of Commons, “Post-legislative Scrutiny – The Governments Approach”, March 2008, para. 2.4.

³⁴ This is Mousmouti’s effectiveness test: M. Mousmouti (above, n. 19), 202.

³⁵ See Lord H. Thring, “Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents” (London, John Murray, 1902), 61.

³⁶ See *Compact Oxford English Dictionary of Current English* (Oxford, Oxford University Press, 2005).

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ J. MacKaye, A. W. Levi and W. Pepperell Montague, “The Logic of Language” (Hannover, Dartmouth College Publications, 1939), chapter 5.

⁴⁰ For the distinction between semantic and syntactic ambiguity, see R. Dickerson, “The Fundamentals of Legal Drafting” (Boston, Little-Brown, 1986), 101 and 104; for an application of rules of logic to resolve syntactic ambiguities, see L. E.

gislative expression allow the user the opportunity to understand fully the regulatory message, as expressed in legislation, if the regulatory message is the imposition of a new obligation, the user understands clearly, precisely, and unambiguously what they are being asked to do or omit. As a result, their decision to comply with the new obligation or not is one based on their free choice rather than on their capacity to understand what this new obligation is. If the regulatory message is the award of a new right, then the full exercise of the new right by all those intended to be covered by the law relies on their full understanding of what they are now able to do. Thus, compliance, and the resulting regulatory success, becomes a matter of conscious choice for the user, rather than a matter of the users' subjective interpretation of the exact content of the legislation and, ultimately, the regulation.

Clarity (which encompasses precision and unambiguity as its pre-requisites) is enhanced by easified language and GIL. Since clarity is directly linked to legislative effectiveness and regulatory efficacy, easification and gender inclusivity are also linked to efficacy and effectiveness. As feeders of clarity, they strengthen the capacity of the legislative text to contribute greatly towards the production of the desired regulatory results. They are vessels that render compliance a true choice for users.

Previous versions of my work referred to plain language and gender-neutral language in the pyramid. However, recent developments in linguistics and social studies require an update to the concepts and their corresponding terms.

Easified language is the evolution of plain language. Eagleson defines plain language as clear, straightforward expression, using only as many words as are necessary. It is language that avoids obscurity, inflated vocabulary and convoluted sentence structure. It is not baby talk, nor is it a simplified version of the English language.⁴¹ Redish defines plain English as writing that is straightforward, that reads as if it were spoken. It means writing that is unadorned with archaic, multi-syllabic words and majestic turns of phrase that even educated readers cannot understand. Plain English is clear, direct, and simple; but good plain English has both clarity and grace.⁴² Plain language takes into account design and layout, as well as language, and means analyzing and deciding what information readers need to make informed decisions, before words, sentences,

Allen, "Symbolic logic: a razor-edged tool for drafting and interpreting legal documents" (1956-1957) 66 Yale L. J. 833, 855.

⁴¹ See R. D. Eagleson, "Writing in Plain English" (Commonwealth of Australia, 1990), 4.

⁴² See J. C. Redish, "The Plain English Movement" in S. Greenbaum, "The English Language Today" (New York, Pergamon Press, 1985) 125, 126.

or paragraphs are considered.⁴³ A plain language document uses words economically⁴⁴ and at a level that the audience of the particular text can understand. Sentence structure is tight. The tone is welcoming and direct. The design is visually appealing.⁴⁵ Common problems identified by the plain language movement are long sentences; passive voice;⁴⁶ weak verbs; superfluous words; legal and financial jargon; abstract words; and unreadable design and layout.⁴⁷ This is all good. However, plain language reflected a flat text with bi-dimensional communication between regulator and regulated en masse. This is not a true picture of legislative audiences.

The UK's Good Law survey identified at least three groups of legislative audiences, namely:

- a. Non-lawyers who use legislation in their work, such as law enforcers, human resources professionals, or local council officials; the 'Mark Green' of the survey represents about 60% of users of legislation;
- b. Lay persons who seek answers to questions related to their personal or family situation; 'Heather Cole' represents about 20% of users of legislation; and
- c. Lawyers, judges, and senior law librarians; the 'Jane Booker' persona represents about 20% of users of legislation.⁴⁸

This new empirical data demolishes the adequacy of standing of plain language laws as clear means of communication with the users. What it invites instead is a multidimensional text that can speak clearly to all legislative audiences. This relativity of communication is offered by an easified text, namely a text tailor-pitched to the concrete legislative audiences of the specific legislation.

⁴³ See B. A. Garner, "Legal Writing in Plain English" (Chicago, The University of Chicago Press, 2001), 10-13.

⁴⁴ See R. Wydick, "Plain English for Lawyers" (Durham, North Carolina, Carolina Academic Press, 1998), 9.

⁴⁵ *Ibid.*, 121-134.

⁴⁶ See "Maine Manual in Legislative Drafting", Part III, Chapter 1, Section 7, at <http://legislature.maine.gov/doc/1353>.

⁴⁷ See "Guidelines on Process and content of legislation 2001 (including the 2003 Supplement)", May 2001, Updated September 2003, Legislation Advisory Committee, Ministry of Justice, Wellington.

⁴⁸ See A. Bertlin, "What works best for the reader? A study on drafting and presenting legislation", 2014, The Loophole, <https://www.gov.uk/government/publications/legislation-what-works-best-for-the-reader>, 27-28.

The second tool of clarity, GNL, has also evolved. GNL is viewed as a tool for accuracy⁴⁹ not least because it promotes gender specificity in drafting⁵⁰ and before the courts.⁵¹ Gender-specific⁵² language serves in parallel with plain language, as an additional tool for the promotion of precision, clarity, and unambiguity.

Having identified the contribution of GNL and GIL, as its successor, to clarity, legislative effectiveness, and regulatory efficacy, it is time to discuss what type of gender related language is to be pursued and how.

III. Gender-inclusive language in the English speaking world: Thornton to the rescue

In the English speaking world, gender neutrality is gaining ground. GNL has been adopted by the New South Wales Office of Parliamentary Counsel in 1983, by New Zealand in 1985, by the Australian Office of Parliamentary Counsel in 1988, by the UN and the International Labour Organization roughly around 1989, by Canada in 1991, by South Africa in 1995, and by the US Congress, albeit not consistently, in 2001. In the UK GNL is applied to all government Bills and Acts since 2007.⁵³ However, most Commonwealth drafters in other jurisdictions find it difficult to understand the rationale of GND, since most Interpretation Acts expressly state that “he includes she”.⁵⁴

⁴⁹ See D. T. Kobil, “Do the Paperwork or Die: Clemency, Ohio Style?” (1991) 52 *Ohio State L. J.* 655; K. W. Graham Jr. and C. A. Wright, “Commenting on Gender Neutral Amendments to a Federal Rule of Evidence” (Federal Practice and Procedure, para. 5231.1) (Suppl 1998).

⁵⁰ See Commentary, “Avoidance of sexist language in legislation” (1985) 11 *Commonwealth L. Bull.* 590, 590.

⁵¹ See W. B. Hill Jr., “A need for the use of nonsexist language in the courts” (1992) 49 *Wash and Lee L. Rev.* 275.

⁵² See S. Petersson, “Gender-neutral drafting: recent Commonwealth developments” (1999) 20 *Statute Law Review* 35, 57.

⁵³ See the statement of the Leader of the House of Commons HC Deb 8 March 2007, c146 WS. See also the debates in the House of Lords in 2013 and 2018: HL Deb 12 December 2013 cols 1004-1016; HL Deb 25 June 2018 cols 7-9.

⁵⁴ See for example section 6 of the UK Interpretation Act 1978.

The problem is that few non-lawyers are aware of the Interpretation Act. With reference to unambiguity,⁵⁵ “he” can be both “he” and “she” in a great number of statutes, but equally “he” is only “he” where gender-specific language is actually appropriate.⁵⁶ For example, in jurisdictions where the military is exclusively male, one wonders whether the application of “he includes she” could lead to the admission of women in the army by broad interpretation of the male pronoun under the Interpretation Act, especially where there is no express provision to the contrary. Mary Jane Mossman, a Canadian legal academic explains the reasons for non-discriminatory language in law as being important to promote accuracy in legal speech and writing; to conform to requirements of professional responsibility; and to satisfy equality guarantees in laws and the constitution.⁵⁷ GND is also practicable,⁵⁸ provided that “it comes at no more than reasonable cost to brevity or intelligibility”⁵⁹. In fact, there is no technical reason why legislation should not be drafted in a way that avoids gender-specific pronouns.⁶⁰

The identification of the most appropriate drafting technique for gender neutrality in legislation can be undertaken by means of Thornton’s methodology for legislative drafting. Let us begin with stage 1, understanding the proposal. The objective of gender neutrality used to be equality between male and female. Moving on to stage 2, analysing the proposal, leads us to the realisation that binary rigid approaches to sex and gender are no longer prevalent in society. Gender inclusivity is now perceived by the LGBTIQ+ community to extend far beyond two sexes. The purpose of GIL is to waive gender from the circle of attributes of the subjects of legislation, as a means of putting to effect that gender is not a relevant factor in the eyes of the law, unless of course sex and gender specificity is required. Moving on to stage 3, designing the legislative solution, one is led to identify a language structure that ignores gender considerations whilst serving clarity, precision, and unambiguity in its widest subject inclusiveness. Here lies the revelation: current language structures are bound to grammatical expression that is intrinsically linked to male/female/neutral (in some languages). And therefore, in moving to stage 4 and composition, the only solution available seems to be to depart from current language and introduce a new gender-inclusive form of

⁵⁵ See W. P. Statsky, “Legislative Analysis and Drafting” (Saint Paul, Minnesota, West Publishing Company, 1984), 183.

⁵⁶ See G. G. Corbet, “Gender” (Cambridge, CUP, 1999), 21.

⁵⁷ See M. J. Mossman “Use of Non-Discriminatory Language in Law” (1995) 20 *International Legal Practice* 8.

⁵⁸ See S. Petersson, “Gender Neutral Drafting: Recent Commonwealth Developments” (1999) 20 *Statute Law Review* 35, 57.

⁵⁹ See “Gender-neutral drafting techniques”, Drafting Techniques Group Paper 23 (final): December 2008.

⁶⁰ See D. Greenberg, “Craies on Legislation” (London, Sweet and Maxwell, 2008).

words. For stage 5, verification, one can add that a new gi expression serves the purpose of inclusivity both as an expression but also as a novelty that can attract attention to the new inclusivity ethos, thus contributing to educating the users in the new inclusivity ethos.

According to the guidance of the UK Office of Parliamentary Counsel gender inclusivity entails abandoning gender-specific pronouns to refer to a person who may be either male or female or neuter; and avoiding nouns that take a form that appears to assume that a man rather than a woman will hold a particular office, do a particular job or perform a particular role.⁶¹ From the point of view of terminology choices, the term “man” is to be avoided. Originally, it meant human being or person, but over the years, it has come to mean only male humans. For many people, the generic use of “man” causes ambiguity as to which of the two concepts it conveys person, or male human? Similarly, the term “Chairman” generates distaste. Chairperson, convener, coordinator, moderator, president are possible alternatives,⁶² but the term “Chair” has emerged as the most accepted alternative in government, universities, and business.⁶³ “Madam Chair” or “Mr. Chair” defeat the object of gender inclusivity. Similarly, “he” (his, him, himself) are gender-specific terms and are to be used only when referring to a male person. Equally gender-specific are female pronouns as choices reflecting both male and female. The prevalent in the US⁶⁴ “he and she”, “he/she”, or “s/he” to indicate that both sexes are included in the statement⁶⁵ may be unambiguous,

⁶¹ See Sir S. Laws, “The implementation of a policy of gender-neutral drafting”, 19 June 2007, RRDrafting note.fm.

⁶² See Guidelines on Gender-Neutral Language published by UNESCO (1999), 9, at <http://unesdoc.unesco.org/images/0011/001149/114950mo.pdf>.

⁶³ See for example the Pensions Act 2008, Schedule 1, and the Child Maintenance and Other Payments Act 2008, Schedule 1. But the use of “chair” remains controversial: the New Zealand Law Commission Legislation Manual Structure and Style 1999, 48, suggests “chairperson” while avoiding “chair”. In 2007 Conservative MP Ann Widdecombe declared: “A chair is a piece of furniture. It is not a person. I am not a chair, because no one has ever sat on me”: see T. Branigan, “Straw: future laws to be gender neutral”, *Guardian*, 9 March 2007, <http://www.guardian.co.uk/gender/story/0,,2030075,00.html>.

⁶⁴ See C. Williams, “The End of the ‘Masculine Rule’? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland” (2008) 29 *Statute Law Review* 139, 139.

⁶⁵ But this has been criticised by Bentham who used this exact term for his definition of long-windedness: see J. Bentham, “Nomography or the Art of Inditing Laws” in J. Bowring (ed.), “The Works of Jeremy Bentham” (Edinburgh, William Tait, 1843), III: 231, 265.

but it is cumbersome, gender-specific, and clumsy⁶⁶. Other techniques include repeating the noun; or omitting the pronoun;⁶⁷ or converting the noun to a verb form; or using passive voice; or using a relative clause; or using the plural noun followed by “they”;⁶⁸ or replacing the noun with a letter⁶⁹.

All of the above are techniques present distinct disadvantages. They tend to serve neutrality, in that they include the female in the legislative expression. But they do not serve real inclusivity, as they do not allow for diversity outside the two genders. Moreover, they do not waive gender from the circle of relevant attributes of legislative subjects. If anything, they draw more attention to the distinction between two genders.

The preferred technique for real gender inclusivity is the use of the singular noun followed by the plural “they” rather than singular pronouns “he” or “she”: for example, “a doctor, who fails their examination”. This technique was favoured by authors prior to the nineteenth century⁷⁰ and is still common in contemporary English.⁷¹ Whether this popular usage is correct or not is perhaps a matter of dispute. OED (2nd ed, 1989) records the usage without comment. SOED (5th ed, 2002) notes that it is “considered erroneous by some”. It is certainly well preceded in respectable literature over several centuries.⁷² However, in the debate on gender-neutral drafting in the House of Lords in 2013 a number of peers expressed concern about the use of “they” as a singular pronoun. This may explain

⁶⁶ See R. Wydick, “Plain English for Lawyers” (Durham, North Carolina, Carolina Academic Press, 1994), 72.

⁶⁷ This is the prevalent technique in Australia: see “Avoidance of ‘sexist’ language in legislation” (1985) 11 Commw. L. Bull. 593.

⁶⁸ For example: “The regulations may provide that participants may only carry on activities... if they hold a permit.” (Climate Change Act 2008, Schedule 2, paragraph 10).

⁶⁹ For example: “If a person (S) who is registered under this Chapter as a service provider in respect of a regulated activity carries on that activity while S.s registration is suspended, S is guilty of an offence.” (Health and Social Care Act 2008, section 34(1)).

⁷⁰ See A. Bodin, “Androcentrism in prescriptive grammar: singular ‘they’, sex indefinite ‘he’, and ‘he or she’” (1974) 4 Language in Society 129, 131-133; also see S. Petersson, “Gender Neutral Drafting: Historical Perspective” (1998) 19 Statute Law Review 93.

⁷¹ See C. Miller and K. Swift, “The Handbook of Non Sexist Writing” (New York, Lippincott and Crowell, 1980), 38-40.

⁷² See the examples in the OED and Fowler’s Modern English Usage, 3rd ed. (Burchfield) 1996.

why the technique lost support in the newer versions of the Office of Parliamentary Counsel's Guidance from 2014 onwards⁷³. However, the technique is supported by authors, as it is the most compatible with spoken English.⁷⁴ An example of it can be found in the Counter-Terrorism Act 2008: "References in this Part to a person being dealt with for or in respect of an offence are to their being sentenced...in respect of the offence." And a further example comes from the Local Democracy, Economic Development and Construction Act 2009, Schedule 1, paragraph 2(5)(b): "[...] the chair holds office [...] in accordance with the terms of their appointment." The technique is rather innovative, since it uses a grammatical error to draw the reader's attention to gender inclusivity. But at the same time it demonstrates quite rightly that drafters must use grammar without being its slave. It is better to be inelegant than uncertain.⁷⁵

Departing from grammatical rules for the purposes of achieving gender inclusivity is a policy that has fertile ground in languages other than English, where gender is expressed not just by the endings of nouns but also the endings of adjectives and verbs.

Conclusions

Gender inclusivity is a concept much wider than gender neutrality. Neutrality promotes equality between men and women and can therefore be viewed as an expression of feminism in legislative drafting. In contrast to that, gender inclusivity promotes the elimination of gender from the attributes of the subjects of legislation. It goes beyond gender equality, and reflects the continuous evolution of the LGBTQI+ movement.

From the point of view of substantive law, gender-inclusive legislation expresses to a fuller extent the constitutional principle of equality in the eyes of the law: everyone, not just men and women, is equal before the eyes of the law.

From the point of view of legislative drafting, gender inclusivity put to effect to a fuller extent the requirement of clarity. In legislation where all citizens are subjects of the regulation, gender inclusivity conveys expressly and clearly the sub-

⁷³ See Office of the Parliamentary Counsel Drafting Guidance, 20 March 2014, 29-30.

⁷⁴ See D. Schweikart, "Gender Neutral Pronoun Redefined" (1990-1999) 20 *Women's Rights Law Reporter* 1, 8.

⁷⁵ See J. K. Aitken and E. L. Piesse, "The Elements of Drafting" (Sydney, The Law Book Company Limited, 1995), 57.

jection of all citizens of any or no gender to the regulatory and legislative messages of legislation. Moreover, gender inclusivity draws attention to gender specificity, where needed, as it contrasts loudly with the introduction of legislative texts addressed exclusively to specific genders.

In that respect, gender inclusivity enhances clarity in legislative expression, as it expresses with clarity, precision, and unambiguity if and where gender is relevant in legislation. As a tool to clarity (which encompasses precision and unambiguity as *sine qua non*), gender inclusivity enhances legislative effectiveness.⁷⁶ It ensures that users understand fully whether the legislation addresses and covers them or not, thus rendering compliance an issue of subjective intention, not intelligibility of legislative communication.

In turn, legislative effectiveness serves regulatory efficacy, in that it serves as a tool for the achievement of policy/regulatory results. Setting the regulatory result sought via gender related legislative expression affects radically the legislative technique to be used as an expression of gender in legislation.

The regulatory aim of the GND policy is to redress the balance of gender inequality in society⁷⁷. Thus, the choice of the most effective GNL tool is to be made on the basis of two criteria: one, clear inclusion of the female; and two, education of the users on the changed policy. This calls for a tool that quickly identifies the new position whilst at the same time reflecting gender neutrality or gender equality. On that basis, the singular plural technique is ideal: it breaks the barriers of an inherent gender-specific language, and uses a grammatically unconventional form to alert the user of the departure from gender-specific to gender-neutral.

The regulatory aim of GID is to eliminate gender as a relevant factor in legislation, unless otherwise required. Here the choice of the preferred tool is based on: one, the removal of gender from legislative expression; and two, education of users on the changed policy. For the purposes of gender inclusivity, the singular plural is the sole option.

⁷⁶ See H. Xanthaki, "On Transferability of Legislative Solutions: The Functionality Test" in C. Stefanou and H. Xanthaki (eds.), "Drafting Legislation: A Modern Approach" (Aldershot, Ashgate, 2008) 1, 17; also see M. Wilson, "Sir William Dale Annual Memorial Lecture – Gender-Neutral Law Drafting: The Challenge of Translating Policy into Legislation" (2011) 13 *Eur. J. L. Reform* 199, 207.

⁷⁷ See UNDP, "Drafting gender-aware legislation: how to promote and protect gender equality in Central and Eastern Europe and in the Commonwealth of Independent States", 2003, 21.

Thus, the singular plural remains the preferred tool for gender neutrality and gender inclusivity. Currently, there is a degree of resistance to its use, mainly from those who are reluctant to depart from grammar in legislative expression. However, it is precisely that departure from grammar that makes the singular plural an attractive solution: via its diversity, it attracts users' attention to the fact that it is a departure from the currently gender-specific language structures. And it is a loud call for language to finally catch up with societal change: everyone is entitled to see themselves covered expressly in legislative expression. "He" no longer includes any other than him and him alone.